while the appellant was at Juang was proved beyond doubt. There is evidence on which the assessors could reasonably have deduced that the appellant was in continuous possession of a hand grenade between the dates charged. Even if their opinion on this was incorrect, there always remains the period at Juang which must be viewed as proved beyond doubt.

The appeal is dismissed.

Sir Charles Murray-Aynsley, C.J., (S.) : — In this case I find myself unable to agree. The reason for my disagreement is on a matter of law and relates to the charge. It appears to me that if the words of the charge are to be given their natural meaning, five distinct acts of possession are alleged and not one act of continuous possession. Discontinuity in space involves also discontinuity in time. This is bad on two grounds : the number of the acts and the time over which they are distributed. In my opinion this is fatal and we are not entitled to consider what in point of fact was proved at the trial, still less what the prosecution announced its intention of proving. It is clear that there was no proof of continuous possession; for the year 1950 the evidence left an almost complete gap. That there was sufficient evidence of possession within the period alleged is clear enough. However, I regard the defect in the charge as fundamental and I would allow the appeal. I say nothing about the other grounds of appeal.

Whitton, J. : — I have had the advantage of reading the draft judgment of the learned President in this appeal with which I am in full agreement and have nothing to add.

Appeal dismissed.

R. v. KOH KWONG & ANOR.

[Cr. R. J. (Spenser Wilkinson, J.) November 17, 1952]

[Penang — Criminal Revision No. 20 of 1952]

Criminal Procedure Code (Cap. 21), s. 270 — Penal Code, s. 72 — Conviction in the alternative — Fine paid from money found on accused.

In this case the two accused were charged with housebreaking and theft and alternatively to the second charge with retaining stolen property, and convicted of this second charge and the alternative. The stolen property included an item of $40 cash. The 1st accused was sentenced to 12 months rigorous imprisonment and fined $50. $50 out of 51 found on the 1st accused was taken in settlement of the fine.

Held: (1) conviction in the alternative is permissible under section 270 of the Criminal Procedure Code and section 72 of the Penal Code. It should be used only where the doubt is between two offences of a similar gravity. A conviction in the alternative for housebreaking and receiving would not be justified because the accused should be given the benefit of the doubt and convicted of the lesser offence; (2) although it is impossible to identify the actual notes lost, the circumstances were so strong as to make it virtually certain that $40 of the $51 found on the 1st accused belonged to the complainant who is, therefore, entitled to restitution.

Case referred to :—

(1) *Rex v. James Loughlin* 25 Cr. App. Rep. 69.

CRIMINAL REVISION.

C. M. Sheridan for the Crown.

1st accused in person, 2nd accused absent.

Spenser Wilkinson, J. : — This case came before me by way of revision at the request of the learned President, who tried the case. The facts of the case are that at some time between 10 p.m. and 5 a.m. on the night of the 6th/7th August, 1952 the Presbystery at No. 3, Farquhar Street was broken into and cash amounting to $40, two fountain pens, a mouth organ and a watch were stolen therefrom. At 4.05 a.m. that morning a policeman saw a Chinese and a Malay running from the direction of China Street into Pitt Street and caught and searched them. On the person of one (the 1st accused) were found $51 and the two fountain pens and of the other (the 2nd accused) the mouth organ and the watch. The two accused were originally charged jointly with two offences; first with housebreaking by night under section 457 of the Penal Code and secondly with theft in a dwelling house under section 380 of the Penal Code. After the two accused had been charged the learned President added a Charge alternative to the Second Charge, of retaining stolen property under section 411 of the Penal Code. When the accused were called upon for their defence they neither of them gave evidence on oath but each made a statement from the dock which in my opinion would not have been accepted by any reasonable jury. These statements can, therefore, be ignored for the purposes of this revision. Having heard the defence the learned President acquitted both accused on the 1st Charge and recorded a conviction in the alternative against each accused on the Charge of theft and the retaining Charge. The 1st accused was sentenced to 12 months' rigorous imprisonment and fined $50 and the 2nd accused was released on bond under section 290 of the Criminal Procedure Code. A total of $51 had been found on Accused No. 1 and of this $50 was taken in settlement of the fine. Since then the Reverend Brother Serman, who was the complainant and whose cash was stolen, has applied to the learned President for the return of his $40.

Two points arose on this revision. The first was whether the alternative conviction was correct. Convictions in the alternative are unusual. They are

permissible under the combined effect of section 72 of the Penal Code and section 270 of the Criminal Procedure Code. I think, however, that the alternative conviction should be used only where the doubt is between two offences of similar gravity. There may be cases, particularly where the possession of fairly recently stolen property is the only evidence against an accused person, where it is quite certain that the accused is either a housebreaker or a receiver but quite impossible to tell which, but in such a case I do not think a conviction in the alternative would be justified because the accused should be given the benefit of this doubt and convicted of the lesser offence. In the present case I think the evidence that the accused were the thieves was very strong. In this connection I think it is useful to quote from the judgment of the Lord Chief Justice in the case of *Rex v. James Loughlin*[1]:—

"Now, it is too often the case, where a man is charged with housebreaking and the evidence against him is that soon after the breaking and entering he is in possession of the property, that the Court directs the jury that there is no evidence that he broke and entered and tells the jury to concentrate on the receiving. That is not the law. If it is proved that premises have been broken into, and that certain property has been stolen from those premises, and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebraker or shopbreaker and, if he is, it is inconsistent to find him guilty of receiving, because a man cannot receive from himself."

The last portion of this passage is not quite applicable to the present case because the alternative charge was not for receiving stolen property but for retaining it, and of course the thief himself can retain stolen property. However, the possession of the property was very recent indeed. The Police caught the two accused practically red-handed almost immediately after the theft and in the vicinity of the premises which had been broken into. In my opinion, therefore, there was ample evidence upon which both accused could have been convicted under section 380 of the Penal Code and I therefore altered the conviction of the 1st accused to one under this section. I did not interfere with the conviction of the 2nd accused because he was not present at the hearing and the alteration of the conviction to one under section 380 might be thought to be an order to the prejudice of the accused within the meaning of section 322(2) of the Criminal Procedure Code.

The second point arose from the order of the learned President that the money found on the person of accused No. 1 should go in payment of the fine. Although of course it was impossible to identify the actual notes which the complainant had lost it seemed to me that the circumstances were so strong as to make it virtually certain that $40 of the $51 found on the person of accused No. 1 belonged to the complainant, who is, therefore, entitled to restitution of his property.

Except in respect of this $40 I saw no reason to interfere with the sentence and I therefore varied the sentence on accused No. 1 by reducing the fine to $10 instead of $50 and by ordering that the $40 being the balance of the original fine be paid to the complainant.

Judgment accordingly.

CHOP LEAN YAK v. NG AH HEE.

[A. C. J. (Spenser Wilkinson, J.) November 18, 1952]

[Penang — Civil Appeal No. 3 of 1952]

Landlord and tenant — Claim for possession — Arrears of rent — Whether duty of tenant to tender rent due or duty of landlord to demand rent on the premises or elsewhere.

The important point raised in this appeal regarding a claim for possession on the ground of rent being in arrears for more that 14 days is whether it is the duty of a tenant to tender rent to the landlord, or whether it is the duty of the landlord to demand the rent on the premises or elsewhere.

Held: it is the duty of the landlord to make a demand for rent on the premises and if he does not do so he cannot rely upon the proposition that rent is in arrear.

Cases referred to:—

(1) *Haldane v. Johnson* 8 Ex. 689.

(2) *Thung Fun v. Looi Fong Um* (1952) M.L.J. 122.

(3) *Kor Aik v. Tay Aik Liok* (1951) M.L.R. 103.

(4) *Tan Yee Moh v. Varthammal* (1948) M.L.J. 55.

(5) *Varthammal v. Tan Yee Moh* (1948) M.L.J. 180.

CIVIL APPEAL.

Eusoffe Abdoolcader for the appellants.

Lim Cheng Poh for the respondent.

Spenser Wilkinson, J. : — The claim in this action was to recover possession of premises No. 27, Cross Street, Bukit Mertajam on the ground that rent was in arrear for more than fourteen days.

There was a conflict of evidence in the Court below. Evidence was given by the plaintiff-respondent that he went to collect the rent for August on the 30th August, 1951 at the premises but that the defendant told him that he had no money. He also stated that he went again on the 30th September and on the 1st October, 1951 but that the defendant had no money. The defendant-appellant in his evidence denied that the plaintiff had called at the premises at all and stated